Labor Protections and Welfare Reform

Accessibility Information

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The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 increased emphasis on the need to move welfare recipients from welfare to work. The new law gives state and tribal governments broad latitude to meet specified work requirements. However, requirements of other laws affecting workers and the workplace also must be met.

In an effort to help you better understand the requirements of these other laws, the United States Department of Labor has prepared a guide entitled "*How Workplace Laws Apply to Welfare Recipients*" that is attached. In addition, the United States Department of Agriculture has developed additional guidance to clarify the use of food stamps as a means to meet the requirements of the minimum wage law that is also attached.

If you have questions concerning the application of workplace laws to the Temporary Assistance for Needy Families program, please direct inquiries to the U S. Department of Labor or other designated contact.

How Workplace Laws Apply to Welfare Recipients

The passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) in August 1996 increased emphasis on the need to move welfare recipients from welfare to work. Under the Act, the Aid to Families with Dependent Children (AFDC) program was replaced with the Temporary Assistance for Needy Families (TANF) program. The new welfare law gives state and tribal governments broad latitude to meet specified work requirements.(1) However, requirements of other laws affecting workers and the workplace also must be met.

Work Activities and Requirements

The welfare law requires that a designated percentage of all TANF families have an adult engaged in work activities (families with no adults are exempted). States have the option of exempting single parents of children under one from the work requirement. The required participation rates increase each year, culminating at 50 percent for all families with an adult and 90 percent for two-parent families in FY 2002.

In order to be counted towards the work participation rate, a single parent is required to be engaged in a work activity, as defined by the law, for 25 hours in FY 1999 and 30 hours beginning in FY 2000. For an adult in a two-parent family, 35 hours of work are required. Qualifying work activities include a range of subsidized and unsubsidized, private and public sector employment.

In addition, a limited number of TANF recipients can meet the work requirement by participating in vocational training and high school education programs.(2)

About This Guide

This guide contains general questions and answers on how workplace laws enforced by the Department of Labor apply to welfare recipients. It is an effort to answer fundamental questions about the relationship between welfare law and workplace laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance (UI) and anti-discrimination laws. States should consider the applicability of these laws as they design and implement their work programs. The guide also addresses the relationship between the tax treatment of welfare benefits and workplace laws.

This guide is simply a starting point. It cannot provide the answers to the wide variety of inquiries that could be raised regarding specific work programs. The impact of workplace laws on work programs for welfare recipients and the answers to many questions will be determined by the specific facts of the particular situation. Many questions will have to be answered on a case-by-case basis.

Employment Laws

1. Do federal employment laws apply to welfare recipients participating in work activities under the new welfare law in the same manner they apply to other workers?

Yes. Federal employment laws, such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance (UI), and anti-discrimination laws, apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws.

The Fair Labor Standards Act

2. Does that mean that welfare recipients engaged in work activities under the new welfare law will have to be paid the minimum wage?

The minimum wage and other FLSA requirements apply to welfare recipients as they apply to all other workers. If welfare recipients are "employees" under the FLSA's broad definition, they must be compensated at the applicable minimum wage. (3)

Welfare recipients would probably be considered employees in many, in fact most, of the work activities described in the new welfare law. Exceptions are most likely to include individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance, because these programs are not ordinarily considered employment under the FLSA.

3. Are welfare recipients who participate in job training exempt from the minimum wage laws?

An individual in training that meets certain criteria under the FLSA and is not otherwise an employee, is considered a trainee and is not entitled to the minimum wage. Similarly, a welfare recipient engaged in training that meets those criteria would not be an employee covered by the minimum wage requirements of the FLSA. The relevant criteria for such training are:

- Training is similar to that given in a vocational school;
- Training is for the benefit of the trainees;
- Trainees do not displace regular employees;
- Employers derive no immediate advantage from trainees' activities;
- Trainees are not entitled to a job after training is completed; and
- Employers and trainees understand that trainee is not paid.

4. How does the FLSA affect "workfare" arrangements that require welfare recipients to participate in work activities as a condition for receiving cash assistance from the state?
Welfare recipients in "workfare" arrangements, which require recipients to work in return for their welfare benefits, must be compensated at the minimum wage if they are classified as "employees" under the FLSA's broad definition.

Where the state is the employer of a workfare participant who is an employee for FLSA purposes, the state may consider all or a portion of cash assistance as wages for meeting the minimum wage so long as the payment is clearly identified and treated as wages, the payment is understood by all parties to be wages, and all applicable FLSA record keeping criteria are met. Where a private company or local government agency is the employer of the workfare participant, the state welfare agency may use the recipient's welfare benefits to subsidize or reimburse that employer for some or all of the wages due.

5. Could states that operated Community Work Experience Programs (CWEP) for welfare recipients under the predecessor JOBS program continue to operate such programs in the same manner under the new welfare law?

The ability of states to operate programs like CWEP will depend on the details of their particular programs. The old welfare law specifically stated that a CWEP participant was not entitled to a salary or any other work or training expense provided under any other law. Under CWEP, the welfare grant divided by the hours worked was required to meet or exceed the minimum wage. The new welfare law eliminated CWEP and the entire JOBS program. As a result, welfare recipients must be compensated at the minimum wage if they are classified as "employees" under the FLSAs broad definition. However, if welfare recipients are participating in activities where they are not "employees" under the FLSA definition, they will not have to be compensated at the minimum wage. Thus, while states may be able to continue programs similar to those that existed under CWEP, they may need to modify the program, to reflect changes in the law.

6. May food stamps be counted towards meeting minimum wage requirements?

Under two programs created by the Food Stamp law, food stamp benefits (coupons or their cash value) may contribute towards meeting minimum wage requirements for TANF recipients in work activities.

Under the Food Stamp work supplementation program, employers may receive the value of the food stamp allotment as a wage subsidy for new employee hired as part of the work supplementation program. As with other wage subsidy programs, the value of the Food Stamp benefit is converted to a cash wage subsidy paid by the employer as a wage and is counted towards the minimum wage. This program is restricted to recipients of TANF or other public assistance and contains specific worker protections and non-displacement provisions.

The Food Stamp law specifically permits states to establish Workfare programs (to be approved by the U.S. Department of Agriculture) under which certain welfare recipients are required to perform work in return for compensation in the form of food stamps. In other words, participants may be required to "work off" the value of their food stamps. The state or other employers participating in the workfare program may then credit the value of the food stamps towards its minimum wage obligations. The number of hours that a food stamp recipient may be required to work is determined by dividing the value of the food stamp allotment by the state or federal minimum wage (whichever is higher), up to a maximum of 30 hours per week.

Participation in Food Stamp Workfare programs may be counted towards TANF participation requirements, so that a participant who is employed by the state may receive food stamps as compensation for certain hours and receive welfare benefits as compensation for other hours of employment. In all cases, total compensation must equal or exceed the minimum wage for each hour worked. Additional guidance on the use of food stamps towards the minimum wage will be provided by the U.S. Department of Agriculture's Food Stamp Program Office.

7. Aside from food stamps, may noncash benefits provided by the state, such as child care services or transportation, be credited towards meeting FLSA minimum wage requirements?
Only under limited circumstances. Such benefits may be credited as wages only when the state is the employer and all of the following criteria are met:

- Acceptance of noncash benefits must be voluntary;
- Noncash benefits must be customarily furnished by the employer to its employees, or by other employers to employees in similar occupations; and
- Noncash benefits must be primarily for the benefit and convenience of the employee.

Because these criteria are quite strict, it is likely that these benefits will not count as wages in most circumstances.

Credit may not be taken for pensions, health insurance (including Medicaid), or other benefit payments otherwise excluded under FLSA.

Occupational Safety and Health Act

8. How does the Occupational Safety and Health Act (OSHA) apply to welfare recipients participating in work activities under the new welfare law?

The new welfare law does not exempt employers from meeting OSH Act requirements. Therefore, OSH Act coverage applies to welfare recipients in the same way that it applies to all other workers. However, because the OSHA does not have direct jurisdiction over public sector employees in many states, the question of who is the responsible "employer" is an important one. This is particularly true in cases where work activities are administered as part of a public-private partnership. In these situations, OSHA will determine whether the employee is in the public or private sector on a case-by-case basis. Generally, case law under OSHA tends to place compliance responsibility on the party most directly controlling the physical conditions at a worksite.

9. Does that mean that welfare recipients in work activities deemed to be public employees are exempt from health and safety regulations?

It depends on the state. OSHA does not have jurisdiction over public sector employees in many states. Yet, in the 23 states and two territories where there are OSHA-approved state plans, the states are required to extend health and safety coverage to employees of state and local governments. To the extent participants in these states and territories are employees of public agencies, they would be protected by the applicable health and safety standards. In the other states and territories, there would be no OSHA coverage of participants who are public sector employees.

Unemployment Insurance

10. Are welfare recipients participating in work activities covered by the Unemployment Insurance (UI) System?

Generally, unemployment insurance laws apply to welfare recipients in work activities in the same way that they apply to all other workers. Unemployment insurance coverage extends only to workers who are considered "employees," according to the definitions provided by state UI laws. Consequently, if welfare recipients are in work activities where they would be classified as employees, they will be covered by the UI system.

There are some exceptions. While federal law requires states to extend UI coverage to services performed for state governments and non-profit employers, services performed as part of publically funded "work-relief" employment or "work training" programs may be excluded by states and, in fact, are excluded by all states

except Hawaii. Under the new welfare law, a number of community service-related activities could fall within the "work-relief" exception to UI coverage.
An Unemployment Insurance Program Letter (UIPL 30-96) issued in August 1996 clarified the criteria applicable to the "work-relief" and "work training" exceptions. In order to fall within the exception, activities must primarily benefit community and participant needs (versus normal economic considerations) and services must not otherwise normally be provided by other employees. If such activities do not fall within the exception, participants providing services for these entities would likely be covered by the UI program.

11. What about welfare recipients who are working for private sector employers? Will they be covered by the UI program?

The "work relief" and "work training" exceptions for UI do not apply to the private sector. For private employers the question of UI coverage will hinge on whether a participant is deemed an "employee." The tests for making these determinations are made by the states and are generally similar to the common law test which is based on "the right to direct and control work activities."

Anti-Discrimination Laws

12. Would federal anti-discrimination laws apply to welfare recipients who participate in work activities under the new welfare law?

Yes. Anti-discrimination issues could arise – primarily under titles VI and VII of the Civil Rights Act, the Americans with Disabilities Act, section 504 of the Rehabilitation Act, the Age Discrimination in Employment Act, and the Equal Pay Act. Furthermore, if participants work for employers who are also federal contractors, discrimination complaints could be filed under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, or the Vietnam Era Readjustment Assistance Act. As with other laws discussed above, these laws would apply to welfare recipients as they apply to other workers. Additional guidance on these laws, many of which are not within the jurisdiction of the Department of Labor, will be forthcoming.

Tax Treatment of TANF Benefits

13. Does the Notice issued by the Internal Revenue Service (IRS) on December 17, 1999 (Notice 99-3) addressing the federal income and employment tax consequences of TANF payments made to welfare recipients engaged in TANF work activities mean that such individuals are not employees under the workplace laws?

No. The IRS Notice addresses the conditions under which TANF payments received by individuals engaged in TANF work activities are not income, earned income, or wages for federal income and employment tax purposes. (See IRS Notice 99-3).

As the Notice expressly recognizes, the tax treatment of TANF payments received does not determine whether a welfare recipient engaged in a work activity (including work experience and community service) under TANF is an employee for purposes of the FLSA or the other workplace laws. Rather, the tax determination was based upon considerations unique to federal tax liability. Indeed, the Notice specifically assumes for purposes of its analysis that the recipients of TANF are common law employees.

The Notice also recognized that TANF payments may have two purposes: to promote the general welfare and to serve as compensation for services. Thus, the notice is consistent with the Department's view that TANF participants engaging in most TANF work activities, including work experience and community service, are likely to be employees under the workplace laws.

The courts have recognized that the FLSA has a broader definition of employment than exists under the traditional common law. In order to determine whether someone is an employee under the FLSA, it is

important to consider all of the circumstances relating to the economic realities of the workplace relationship. The common law test of employment status, which is the test of coverage utilized by most of the other laws the Department administers, similarly requires an assessment of all aspects of the worker's relationship to the potential employer, with no one factor being determinative. Whether or not the payments received by a worker are subject to income and employment taxes has no bearing on the economic realities of the relationship test under the FLSA and little bearing on the common law analysis.

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1. This guide refers only to state governments, although it is possible that county or local government entities will be responsible for implementing state and tribal welfare programs. Information in the guide concerning the role of a state agency in implementing the welfare program, paying out the benefits, and, where relevant, employing welfare recipients, would apply to a county or local government agency, where the agency, not the state, implements welfare, pays out the benefits and employs welfare recipients.

2. Indian Tribes may choose to run their own Tribal TANF programs separate from the state. While these programs must incorporate time limits and work requirements, participation rates are determined on a case-by-case basis according to economic need.

3. The FLSA establishes federal minimum wage, overtime pay (for hours worked over 40 in a workweek), child labor, and recordkeeping requirements for covered employees. The law affects full-time and part-time workers in the private sector and in federal, state and local governments. For the FLSA to apply, there must be an employment relationship between an employer and an employee. To "employ" under the FLSA means to "suffer or permit to work." This is a broader definition of employment than exists under the traditional common law. To determine if there is an employment relationship for purposes of the FLSA, one must consider all the circumstances, including the economic realities of the workplace relationship.

USDA Guidance

The Department of Labor has concluded that the Fair Labor Standards Act (FLSA) applies to participants in the Temporary Assistance for Needy Families (TANF) program in the same way as it applies to other workers. This means that in many cases participants will have to be paid the minimum wage.

In calculating the minimum wage, States can combine food stamp benefits and TANF grants. This can be done in either workfare or a [wage] supplementation program. Under a wage supplementation program, the value of benefits are cashed out and provided to an employer who in turn pays the money to participants as a wage.

Furthermore, for those TANF households normally exempt from food stamp workfare because they include parents or caretakers of a dependent child under 6 years old (between 1 and 6 in some States), States may use the Simplified Food Stamp Program to ensure that food stamps count toward the minimum wage. The simplified program was designed to be the vehicle for creating conformity between TANF and the Food Stamp Program States can include parents or other caretakers of a dependent child under the age of six food stamp workfare simply by adopting TANF rules relating to workfare exemptions. Simplified programs must be cost

neutral. Because removing the workfare exemption for parents or caretakers of dependent children will not increase program costs, we will provide expedited approval to such requests.

To make this change, States need only send a letter to the Food and Consumer Service (FCS) indicating their wish to avail themselves of the simplified program. A cost neutralizer analysis is not required.

For additional information on the Simplified Food Stamp Program, States should contact FCS at (703) 305-2519. FCS' mailing address is Food and Consumer Service – Food Stamp Program, 3101 Park Center Drive, Alexandria, VA 22302.